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FILED
AUG 12 1996
CLERK

No. 95-2009

# In the Supreme Court of the United States

OCTOBER TERM, 1995

ROGER W. PIPKIN, III, PETITIONER

*v.*

MORTGAGE CREDITCORP, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE GOVERNMENT NATIONAL MORTGAGE ASSOCIATION IN OPPOSITION

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16 pp

## QUESTION PRESENTED

Petitioner is a default-judgment creditor of the issuer and former servicer of certain Texas real estate mortgages owned by the Government National Mortgage Association (GNMA) but recorded in the issuer's name. Before petitioner obtained his judgment, the issuer defaulted in its obligations to GNMA, which exercised its contractual right to have the issuer's formal interest in the mortgages immediately assigned to GNMA.

The question presented is whether petitioner may divest GNMA of ownership of those mortgages solely because GNMA did not record the mortgages' assignment in accordance with petitioner's interpretation of state law, where the National Housing Act, 12 U.S.C. 1721(g)(1), provides that the mortgages in such circumstances "shall become" GNMA's "absolute property" and that "[n]o State or local law * * * shall preclude or limit the exercise * * * [of GNMA's] ownership rights."

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unpublished, but the judgment is noted at 72 F.3d 138 (Table). The district court opinion (Pet. App. 15a-20a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on December 18, 1995. A petition for rehearing was denied on March 14, 1996 (Pet. App. 13a). The petition for a writ of certiorari was filed on June 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

12 U.S.C. 1721(g)(1) provides, in pertinent part:

> * * * The Association [GNMA] is hereby empowered, in connection with any guaranty under this subsection, whether before or after any default, to provide by contract with the issuer for the extinguishment, upon default by the issuer, of any redemption, equitable, legal, or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages that constitute such trust or pool shall become the absolute property of the Association subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool. No State or local law, and no Federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980), shall preclude or limit the exercise by the Association of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights, as provided in the preceding sentence, in the mortgages constituting the trust or pool against which the guaranteed securities are issued. The full faith and credit of the United States is pledged to the payment of all amounts which may be required to be paid under any guaranty under this subsection. * * *

Texas Property Code Annotated § 13.001 (West 1984 & Supp. 1996) provides, in pertinent part:

> (a) A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.
>
> (b) The unrecorded instrument is binding on a party to the instrument, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

* * * * *

**STATEMENT**

1. The Government National Mortgage Association (GNMA, popularly known as Ginnie Mae) is a government corporation within the Department of Housing and Urban Development. Under Section 306(g) of the National Housing Act, 12 U.S.C. 1721(g), GNMA operates a mortgage-backed securities program under which it authorizes private entities to issue securities backed by federally insured or guaranteed home mortgages. The securities are sold to the public, and the issuer uses the proceeds to make mortgage loans. Under this program, mortgage loans are made, for example, under the mortgage insurance program of the Federal Housing Administration (FHA) and the loan guarantee program of the Department of Veterans Affairs (VA). The program is designed to attract funds into the mortgage market, thereby making FHA and VA mortgages more

readily available and promoting the public policy of increasing home ownership opportunities. Pet. App. 3a-5a; C.A. App. 112-113.[1]

The issuer is responsible for servicing the securities and the mortgages backing them. That includes collecting payments from borrower-mortgagors and remitting principal and interest to the security holders. GNMA, backed by the full faith and credit of the United States, guarantees that the security holders will receive timely payment of principal and interest. Pet. App. 5a; 12 U.S.C. 1721(g). This guarantee makes the securities reliable investments, thus attracting money for mortgage loans. But it also exposes the federal government to substantial liability to the securities holders. Pet. App. 5a; C.A. App. 113-114.

The mortgages backing the securities are the government's fundamental protection against this potential liability. Accordingly, security issuers participating in this program must assign to GNMA all right, title, and interest in the mortgages. The issuer retains only nominal title, and records the mortgages in its name solely to assist it in servicing them. Pet. App. 5a; C.A. App. 114-116.

Section 1721(g) further authorizes GNMA to enter into contracts with each issuer to ensure that, if the issuer fails to meet its obligations, GNMA may declare a default and extinguish all right, title, and interest of the issuer in the mortgages, and thereby make the mortgages the "absolute property" of GNMA, subject "only" to the unsatisfied rights of the holders of the securities backed by the mortgages.

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[1] "C.A. App." refers to the court of appeals appendix.

12 U.S.C. 1721(g)(1). Thus, Section 1721(g)(1) "empower[s]" GNMA

> to provide by contract with the issuer for the extinguishment, upon default by the issuer, of any * * * interest of the issuer in any mortgage or mortgages * * * against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages * * * shall become the absolute property of [GNMA], subject only to the unsatisfied rights of the holders of the securities * * *. No State or local law, and no federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980), shall preclude or limit the exercise by [GNMA] of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights, as provided in the preceding sentence, in the mortgages * * *.

By the express terms of its contracts, GNMA may exercise its rights under this provision simply by issuing a letter of default to the issuer. Pet. App. 5a; C.A. App. 116-117, 136 (§ 7.04). GNMA then immediately takes over the responsibility of making the required payments to the security holders, and it relies upon the immediate and ongoing availability of the mortgages (and the income stream they generate) to help it make such payments. C.A. App. 118.

2. Respondents Mortgage Creditcorp, Inc. and Westmark Mortgage Corporation (collectively, the Westmark Parties) were issuers under the program until GNMA issued them letters of default. Those

letters expressly stated that all of the Westmark Parties' right, title, and interest in their mortgages were extinguished and that the mortgages were therefore the absolute property of GNMA, subject only to the unsatisfied rights of the securities holders. Pet. App. 5a; C.A. App. 117. Because GNMA has limited personnel and resources, it engaged the Midland Parties, consisting of respondent MidFirst Bank, S.S.B., assisted by respondents Midland Mortgage Company and Northwest Bank, to "subservice" the mortgages and securities on GNMA's behalf. C.A. App. 118-119.

3. In a lawsuit wholly unrelated to the mortgages or the program involved in this case, petitioner sued the Westmark Parties in a Texas state court, alleging that they had failed to deliver a lien-free house to him. C.A. App. 309. The Westmark Parties (which apparently were defunct at that time) did not appear or answer, and petitioner obtained a default judgment against them, consisting of $875,478 in actual damages, interest, and attorney's fees, as well as $4 million in punitive damages. Pet. App. 2a; C.A. App. 13-15. GNMA and the Midland Parties were not parties to that suit. C.A. App. 120, 170-171.

Petitioner learned that various mortgages were recorded in Texas under the names of the Westmark Parties. Believing that the Midland Parties (located in Oklahoma) held the mortgage instruments, he filed his default judgment in Oklahoma state court, and caused writs of execution to be served upon the Midland Parties. Pet. 3; Pet. App. 3a, 16a. GNMA, which was joined as a third-party defendant, removed the action to the United States District Court for the Western District of Oklahoma. Pet. App. 3a.

The defendants—GNMA and the Midland Parties—moved for summary judgment. They argued, among other things, that petitioner, as a judgment creditor of the Westmark Parties, could execute only on interests held by the Westmark Parties and that those parties had lost all right, title, and interest in the mortgages when GNMA declared them in default and the mortgages became, under Section 1721(g)(1), the absolute property of GNMA. Therefore, the defendants observed, the Westmark Parties held no interest in the mortgages upon which petitioner could execute.

Petitioner argued that, under Texas Property Code Annotated § 13.001(a) (West Supp. 1996), assignments to GNMA of mortgages on Texas real estate were void unless recorded in Texas property records. Pet. App. 18a. On this basis, petitioner contended that he was entitled to execute upon mortgages recorded under the Westmark Parties' names.

The district court entered summary judgment for the defendants, Pet. App. 15a-20a, holding that Section 1721(g)(1) preempted any state law that might otherwise require GNMA to record its interest in the mortgages.

4. In an unpublished decision, the court of appeals affirmed. It held that, even if the Texas statute applied as petitioner argued, it was preempted by Section 1721(g). The court reasoned that, through the plain language of Section 1721(g), Congress had "emphatically expressed its intent to preempt any state law" that would limit GNMA's rights to the mortgages, and that requiring GNMA to record its interest would impermissibly limit those rights. Pet. App. 7a. The court added that requiring GNMA to comply with Texas's recording statute would

frustrate the purposes underlying GNMA's enabling legislation. *Id.* at 7a-8a.

**ARGUMENT**

1. Section 1721(g)(1) provides that, "in the event of [an issuer's] default and pursuant otherwise to the terms of the contract" between GNMA and the issuer, the mortgages underlying the guaranteed securities in GNMA's mortgage-backed securities program "shall become the absolute property of [GNMA], subject only to the unsatisfied rights of the holders of the securities." By its terms, Section 1721(g)(1) expressly preempts, *inter alia*, any state law that would "limit the exercise" of GNMA's "ownership rights" in those mortgages. The Texas recording statute at issue (assuming that petitioner's interpretation of it is correct)[2] would, if applied here, obviously "limit the exercise" of GNMA's "ownership rights." It is therefore the kind of "state law" that Section 1721(g)(1) expressly preempts.

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[2] Petitioner asserts that all other assignees of mortgages must record their interests in order to preserve them. Pet. 9-10. That appears to be incorrect as a matter of state law. Those who receive assignments of mortgages in the secondary mortgage market (*i.e.*, not only GNMA, but also entities that operate private-sector mortgage-backed securities programs) typically do not and need not record under state recording laws. See Jan S. Krasnowiecki, *et al.*, *The Kennedy Mortgage Co. Bankruptcy Case: New Light Shed on the Position of Mortgage Warehousing Banks*, 56 Am. Bankr. L.J. 325, 330, 332 (1982). "[T]he recording acts, if they apply at all, apply only as between the assignee or other claimant in the mortgage and the owner of the underlying land or those who claim through him; they do not apply as between competing assignees or successive claimants *in the mortgage*." *Id.* at 336; see also Br. in Opp. for Midland Mortgage Co., *et al.*, at 8-12.

Petitioner argues that Section 1721(g)(1) deals only with GNMA's rights against an issuer, "not GNMA's rights against any third party." Pet. 9.[3] That argument is without merit. On its face, Section 1721(g)(1) broadly preempts—in any context, with one well-defined exception—any state law that threatens to impair the "ownership rights" that GNMA is entitled to assume "in the event of default." The *only* parties against whom GNMA may not assert its "absolute" ownership rights in those circumstances are "the holders of securities" with prior, unsatisfied rights. 12 U.S.C. 1721(g)(1). Because the statute specifies this narrow category of third parties against whom GNMA may not assert its otherwise "absolute" ownership rights, it forecloses, by necessary implication, any claims of other third parties, such as creditors of the issuer. See also 12 U.S.C. 1723a(a) ("no attachment, injunction, or other similar process, mesne or final, shall be issued against the property of [GNMA] or against [GNMA] with respect to its property").[4]

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[3] For this proposition, petitioner relies (Pet. 9) on an unpublished district court decision, *DRG Funding Corp.* v. *Secretary of Housing and Urban Development*, Civ. A. No. 88-2202, 1988 WL 90107 (D.D.C. Aug. 12, 1988), that is not on point. *DRG Funding* addresses whether an issuer may challenge GNMA's actions in federal district court. That is why the language quoted by petitioner refers only to GNMA's rights as against issuers.

[4] In any event, as a judgment creditor of the issuers (the Westmark Parties), petitioner can execute only on whatever interest the issuers have in the mortgages. *First State Bank of Amarillo* v. *Jones*, 183 S.W. 874, 876 (Tex. 1916). Here, because Section 1721(g) and the contracts formed pursuant to that provision have extinguished the Westmark Parties' interest in the mortgages, the Westmark Parties have no

2. Even if the Texas recording statute did not fall plainly within the scope of Section 1721(g)'s express preemption provision,[5] it would still be preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483, 1487 (1995), quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Specifically, if a recording requirement could strip GNMA of its ownership interest in the mortgages, then, as the court of appeals correctly observed, "the outstanding securities guaranteed by GNMA would no longer be 'based on and backed by' the mortgages," and "the government would be forced to pay the investors out of general Treasury funds." Pet. App. 8a; see generally 12 U.S.C. 1716(5) (formerly designated as 12 U.S.C. 1716(c) (1988)) (declaring Congress's intent that GNMA's operations be conducted with "minimum loss to the Federal Government").

Petitioner argues that application of the Texas recording statute would not frustrate the statutory scheme because GNMA *could* have recorded its interest and, in theory, avoided a conflict with peti-

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property or other interest upon which petitioner may execute. Thus, even if Section 1721(g) were limited to an issuer's rights in the mortgages, once those rights are extinguished, the issuer's judgment creditors (who stand in the issuer's shoes) can have no better claim to the mortgages than the issuer itself.

[5] Petitioner suggests (Pet. 6-7) that preemption arises only where it is impossible to comply with both state and federal requirements. That is incorrect. Where, as here, a state law falls within the scope of an express preemption provision, it is preempted whether or not it is inconsistent with substantive federal requirements. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992).

tioner's reading of state law. But, as the court of appeals observed (Pet. App. 8a), and as this Court has repeatedly held, a State may not impose burdens on federally sponsored programs or activities beyond the requirements of federal law. See *Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379, 385 (1963); *United States* v. *Union Central Life Ins. Co.*, 368 U.S. 291, 296 (1961); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 235-236 (1947) (federally licensed warehouseman "could not be required by a State to do more or additional things * * * even though they in no way conflicted with what was demanded of him under the Federal Act"). In any event, GNMA presented undisputed evidence below that compliance with the myriad of state and local recording laws would, in fact, impair the efficient operation of GNMA's nationwide mortgage-backed securities program. See C.A. App. 119 (declaration of GNMA official George Anderson).[6]

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[6] Petitioner suggests several circumstances, far removed from the facts of this case, in which (according to petitioner) it would be reasonable to compel the federal government to follow state real property law. See Pet. 10. Any preemption issues raised by those hypothetical scenarios should be addressed if and when they ever actually arise.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1996